

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSHUA D.S. HAMES,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

NO. CV-11-300-RHW

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 12 and Defendant's Motion for Summary Judgment, ECF No. 19. The motions were heard without oral argument. Plaintiff is represented by Lora Lee Stover. Defendant¹ is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Jessica Milano.

I. Jurisdiction

On March 19, 2009, Plaintiff Joshua D.S. Hames filed an application for Title II disability insurance benefits (DIB) and Title XVI supplement security income (SSI). Plaintiff alleges that he has been disabled since August 12, 2007.

¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

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1 His applications were denied initially on June 15, 2009, and again denied
2 upon reconsideration on October 7, 2009. A timely request for a hearing was
3 made. On June 25, 2010, Plaintiff appeared in Spokane, Washington before
4 Administrative Law Judge (ALJ) R. J. Payne. Ronald M. Klein, medical expert,
5 also appeared at the hearing. Plaintiff was represented by attorney Lora Lee
6 Stover.

7 The ALJ found that although Plaintiff was disabled since May 27, 2008, the
8 date the application was filed, a substance use disorder is a contributing factor
9 material to the determination of disability; therefore, Plaintiff has not been
10 disabled under the Social Security Act. Plaintiff timely requested review by the
11 Appeals Council, which was denied on June 24, 2011. The Appeals Council's
12 denial of review makes the ALJ's decision the final decision of the Commissioner.
13 (42 U.S.C. §405(h)). Plaintiff filed an appeal with the U.S. District Court for the
14 Eastern District of Washington on August 12, 2011. The instant matter is before
15 the district court pursuant to 42 U.S.C. § 405(g).

16 **II. Sequential Evaluation Process**

17 The Social Security Act defines disability as the "inability to engage in any
18 substantial gainful activity by reason of any medically determinable physical or
19 mental impairment which can be expected to result in death or which has lasted or
20 can be expected to last for a continuous period of not less than twelve months."
21 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
22 under a disability only if his impairments are of such severity that the claimant is
23 not only unable to do his previous work, but cannot, considering claimant's age,
24 education and work experiences, engage in any other substantial gainful work
25 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

26 The Commissioner has established a five-step sequential evaluation process
27 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
28 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

1 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
2 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
3 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
4 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
5 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
6 416.920(b). If he is not, the ALJ proceeds to step two.

7 Step 2: Does the claimant have a medically-severe impairment or
8 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
9 claimant does not have a severe impairment or combination of impairments, the
10 disability claim is denied. A severe impairment is one that lasted or must be
11 expected to last for at least 12 months and must be proven through objective
12 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
13 severe, the evaluation proceeds to the third step.

14 Step 3: Does the claimant's impairment meet or equal one of the listed
15 impairments acknowledged by the Commissioner to be so severe as to preclude
16 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
17 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
18 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
19 impairment is not one conclusively presumed to be disabling, the evaluation
20 proceeds to the fourth step.

21 Step 4: Does the impairment prevent the claimant from performing work he
22 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
23 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
24 perform this work, the ALJ proceeds to the fifth and final step.

25 Step 5: Is the claimant able to perform other work in the national economy
26 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
27 416.920(f).

28 The initial burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
2 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
3 mental impairment prevents him from engaging in his previous occupation. *Id.* At
4 step five, the burden shifts to the Commissioner to show that the claimant can
5 perform other substantial gainful activity. *Id.*

6 **III. Standard of Review**

7 The Commissioner's determination will be set aside only when the ALJ's
8 findings are based on legal error or are not supported by substantial evidence in
9 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
10 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
11 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
12 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
13 evidence is "such relevant evidence as a reasonable mind might accept as adequate
14 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the
15 ALJ's denial of benefits if the evidence is susceptible to more than one rational
16 interpretation, one of which supports the decision of the administrative law judge.
17 *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the
18 evidence can support either outcome, the court may not substitute its judgment for
19 that of the ALJ." *Matney*, 981 F.2d at 1019.

20 A decision supported by substantial evidence will be set aside if the proper
21 legal standards were not applied in weighing the evidence and making the
22 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
23 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
24 immaterial to the ultimate non-disability determination. *Stout v. Comm'r, Soc. Sec.*
25 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

26 **IV. Statement of Facts**

27 The facts have been presented in the administrative transcript and the ALJ's
28 decision and will only be summarized here.

1 At the time of the hearing, Plaintiff was 30 years old. He is a high school
2 graduate who attended some college. He indicates he attended special education
3 classes. He has worked as a dishwasher, cook, gas station attendant, delivery
4 driver, inventory clerk and paint prep worker.

5 Plaintiff maintains he is unable to work due to fantasizing about killing
6 most men, not being able to handle authority figures, and his Crohn's disease. He
7 suffers from depression and takes medication to deal with his depression and
8 anxiety. He describes being sexually abused by a lot of different men and was
9 abused in foster homes, as well as being physically and sexually abused by several
10 people in his church. He reports his father set him up to be raped when he was 13.
11 He describes receiving a skull fracture after being kidnaped by his mother. He
12 indicates that when he meets men now he can find traits in his former abusers in
13 them and he starts having problems being around them because he fantasizes about
14 mutilating and killing them. He has mood swings, anger, and rage. He noted
15 numerous past almost and actual altercations with people (including supervisors
16 and co-workers) where he barely stopped himself. On one occasion, he states he
17 placed a coworker in a trash compactor and locked it, and on another occasion, he
18 spat on the parking meter attendant. But, he has not had any run-ins with law
19 enforcement.

20 **V. The ALJ's findings**

21 The ALJ found Plaintiff meets the insured status requirements of the Social
22 Security Act through December 31, 2011. (Tr. 25.)

23 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
24 activity since August 12, 2007, the alleged onset date. (Tr. 26.)

25 At step two, the ALJ found Plaintiff had the following severe impairments:
26 drug induced mood disorder; personality disorders; and malingering. (Tr. 26.)

27 At step three, the ALJ found Plaintiff's impairments when including the
28 substance use disorders meet sections 12.04, 12.08 and 12.09 of 20 C.F.R. Part

404, Subpart P, Appendix 1. (Tr. 31.) The ALJ concluded that if Plaintiff stopped the substance use, the remaining limitations would cause more than a minimal impact on Plaintiff's ability to perform basic work activities; therefore, Plaintiff would continue to have a severe impairment or combination of impairments. But, the ALJ concluded that if Plaintiff stopped the substance use, he would not have an impairment or combination of impairments that meets or medically equals any of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr.33.)

At step four, the ALJ found that if Plaintiff stopped the substance use, he would have the residual functional capacity to perform a full range of work at all exertional levels, but with the following non-exertional limitations: work alone with minimal social interaction. (Tr. 33.) The ALJ also found that if Plaintiff stopped the substance use, he would be able to perform past relevant work as a delivery driver, dishwasher, prep painter, and yard worker.

VI. Issues for Review

Plaintiff presents the following issues with respect to the ALJ's findings:

1. The ALJ erred in disregarding the opinions of Plaintiff's providers and consultative examiners regarding Plaintiff's mental conditions;
2. The ALJ erred in assessing Plaintiff's residual functional capacities;
3. The ALJ erred in finding Plaintiff to be capable of past relevant work if substance usage was stopped; and
4. The evidence taken from the record as a whole does not support the ALJ's decision that Plaintiff is not disabled.

VII. Discussion

1. Plaintiff's Credibility

In applying for disability benefits, Plaintiff stated he is unable to work due to borderline personality disorder, PTSD, OCD, and Crohn's disease. (Tr. 178.) He reported he stresses over nothing and his mind creates stressful situations. (Tr. 178.) He stated he wears dirty clothes, does not shave often, has no appetite, and

1 only showers when people tell him he stinks. (Tr. 199.) In dealing with people, he
2 indicated he gets angry and distant. (Tr. 203.) He listed problems with lifting,
3 bending, reaching, sitting, talking, stair climbing, memory, completing tasks,
4 concentration, following instructions, and getting along with others. (Tr. 203.) He
5 maintains he does not get along well with male authority figures and he does not
6 handle stress or changes in routine well. (Tr. 237.) He experiences anxiety and
7 panic. (Tr. 215.) At the hearing, Plaintiff testified he cannot get along with other
8 males. He reported he got fired from a job for shoving a foreman in the trash
9 compactor. He also stated he was fired or quit several jobs due to confrontations
10 with coworkers or fantasizing about harming (including murdering) coworkers.

11 The ALJ did not find him credible. The ALJ concluded that Plaintiff
12 reported exaggerated symptoms and limitations. (Tr. 35.) In doing so, the ALJ
13 relied on the testimony of Dr. Klein, who had reviewed Plaintiff's entire file and
14 testified at the hearing.² The record contains three attempts to measure Plaintiff's
15 personality and coping strategies, and these tests were deemed invalid all three
16 times as Plaintiff had given "overly exaggerated responses" in all three
17 administrations of the test. (Tr. 35.) The ALJ also noted many inconsistencies
18 between Plaintiff's statements and the objective medical evidence. (Tr. 35.) The
19 ALJ concluded that the records do not reflect an individual that is as seriously
20 mentally-impaired as Plaintiff maintains he is. (Tr. 35.) The ALJ noted Plaintiff
21 was not truthful to his medical providers regarding his marijuana use. (Tr. 36.)
22

23 ²Dr. Klein concluded that Plaintiff's statements about fantasizing about killing
24 most men, including men he has never met, can be seen as either a grossly
25 schizophrenic psychological disorder response, or a blatant malingering response.
26 Dr. Klein believes it was either a strange coincidence that Plaintiff was abused in
27 three totally separate areas in his life (home, foster home, church), or another
28 example of malingering or exaggeration.

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1 Also, the record demonstrates statements that are suggestive of a motivation for
2 secondary gain, and Plaintiff is able to spend time with his girlfriend and her
3 family, which suggests he is able to engage in social interaction if he desires. (Tr.
4 36.) Finally, the ALJ found Plaintiff unpersuasive when he testified at the hearing
5 and characterized Plaintiff as being very dramatic in posturing his mental
6 impairments. (Tr. 37.)

7 The ALJ specifically found Plaintiff credible with respect to his depressive
8 symptoms, irritability, lack of motivation, and difficulty with focus and
9 concentration. (Tr. 32.) Although not explicit, it does not appear the ALJ found
10 Plaintiff's statements credible that he had been abused by a lot of different men in
11 different areas (parents, foster homes, church), that he fantasizes about mutilating
12 and killing them, and that he hears voices, that he was able to remember being in
13 diapers and seeing his dad rape his mom.³ Notably, the record is devoid of any
14 reference to Plaintiff's early years,⁴ or whether the reported traumatic events
15 occurred.⁵

17 ³Plaintiff wrote his first member of abuse was "being taped to hangers and hung
18 in the closet to ensure my safety while my father went to the bar or just to his
19 buddy's. (Tr. 220.) He also reports that at some point he was grounded to his room
20 for 6 months. During that time food was delivered to his room, which had no bed
21 or possession of any kind and he was given daily lectures. (Tr. 222.) The ALJ and
22 Dr. Klein did not address these particular claims.

23 ⁴Exhibit B11E contains records from the Spokane Public Schools, but they are
24 undecipherable.

25 ⁵The Court notes that Plaintiff identified Edmond F. Ball, the 3rd, as his
26 stepfather. (Tr. 222.) He stated Ball was his longest father figure but also
27 described him as his tormenter. (Tr. 222.) He referred to him as Eddy. He then
28 went on to explain that Ball is in prison for kidnaping 2 foreign exchange students

1 Plaintiff has not challenged the ALJ's negative credibility finding. Thus, the
2 Court will not disturb the ALJ's credibility findings.

3 **2. Materiality of Substance Abuse / Residual Functional Capacity**

4 Plaintiff argues the ALJ erred in the assessment of Plaintiff's residual
5 functional capacities. Specifically, Plaintiff maintains his mental impairments
6 prevent him from performing any work on a sustained basis, regardless of any
7 substance usage. He maintains his substance usage never rose to the level of
8 addiction and it is not material to a finding of disability. Plaintiff points to the fact
9 that he is being prescribed multiple medications and is still in need of counseling,
10 which prevents him from working.

11 An individual is considered ineligible for disability benefits if "alcoholism
12 or drug addiction would . . . be a contributing factor material to the
13 Commissioner's determination that the individual is disabled." 42 U.S.C. §§
14 423(d)(2)(C), 1382c(a)(3)(J). If the Commissioner finds that a claimant is disabled
15 and is presented with evidence of the claimant's alcoholism or drug addiction, the
16 Commissioner must determine whether the substance abuse is a "contributing
17 factor material to the determination of disability." *Bustamante v. Massanari*, 262
18 F.3d 949, 954 (9th Cir. 2001) (*citing* 20 C.F.R. §§ 404.1535(a), 416.935(a)). In
19 conducting this analysis, the ALJ must evaluate which impairments would remain
20 if the claimant stopped abusing substances. 20 C.F.R. §§ 404.1535(b), 416.935(b).
21 If the remaining limitations would still be disabling, then the claimant's substance
22 abuse is not a material contributing factor. 20 C.F.R. §§ 404.1535(b)(2)(ii),

23 _____
24 from Japan and child rape (Tr. 222.) A quick search in Westlaw reveals that in
25 2001 an Edmund F. Ball was sentenced to 26 years in prison for the rape of two
26 Japanese students at Mukogawa Institute. Ball is described as a leader of the
27 Spokane Power Exchange, a sadomasochism group. However, there is nothing in
28 the record to substantiate Plaintiff's claim that Ball was his step-father.

1 416.935(b)(2)(ii). Conversely, if the remaining limitations would not be disabling,
2 then the substance abuse is material and benefits must be denied. 20 C.F.R. §§
3 404.1535(b)(2)(I), 416.935(b)(2)(I). The claimant has the burden of proving that
4 drug or alcohol addiction is not a contributing factor material to his disability.
5 *Parra v. Astrue*, 481 F.3d 742, 748 (9th Cir. 2007).

6 At the hearing, Dr. Klein testified that if marijuana use was excluded,
7 Plaintiff would have no restriction of activities of daily living, moderate difficulty
8 in maintaining social function, no difficulty in maintaining concentration,
9 persistence, and pace, and no episodes of decompensation. (Tr. 59.) His only
10 limitation would be minimal social interaction. (Tr. 60.) The ALJ relied on Dr.
11 Klein's testimony in concluding that Plaintiff did not meet the Listings, if
12 marijuana use was not considered.

13 Dr. Mabee evaluated Plaintiff on April 8, 2010. Contrary to Dr. Klein, Dr.
14 Mabee stated that Plaintiff's mental health symptoms are not affected by his
15 substance abuse or dependence and concluded drug treatment would not likely
16 improve Plaintiff's ability to function in a work setting.⁶ (Tr. 488.) Also, Dr.
17 Mabee noted that Plaintiff over-reported his psychological symptom, which
18 suggested an attempt to draw attention to his continued need for psychological
19 support and intervention. (Tr. 491.) Although Dr. Mabee's conclusions regarding
20

21 ⁶According to Dr. Mabee, Plaintiff has *marked limitations* in his ability to relate
22 appropriately to co-workers and supervisors, given his difficulty with anger
23 management, and *moderate limitations* in his ability to understand, remember and
24 follow complex instructions, ability to learn new tasks, ability to exercise
25 judgment and make decisions, ability to interact appropriately in public contacts,
26 ability to respond appropriately to and tolerate the pressures and expectations of a
27 normal work setting, and ability to maintain appropriate behavior in a work
28 setting. (Tr. 489).

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1 the effect of marijuana usage differ from Dr. Klein's, they both agree that Plaintiff
2 could work with certain limitations, notably that he must work alone with minimal
3 social interaction. (Tr. 498.)

4 Plaintiff does not challenge the ALJ's finding that if Plaintiff stopped the
5 substance use, he would not have an impairment or combination of impairments
6 that meets or medically equals any of the listed impairments. Rather, Plaintiff is
7 challenging the ALJ's conclusion regarding the effect of the marijuana usage on
8 Plaintiff's Residual Functional Capacity. However, as set forth above, the RFC is
9 supported by the record, specifically Dr. Klein and Dr. Mabee's assessments. The
10 fact that Plaintiff takes medication for his mental impairments does not mean that
11 he cannot work. *See Warre v. Comm'r v. Soc. Sec. Admin.*, 439 F.3d 1001, 1006
12 (9th Cir. 2006) ("Impairments that can be controlled effectively with medication
13 are not disabling for the purpose of determining eligibility for SSI benefits.").
14 Even with the limited record, it appears that Plaintiff responds well to medication
15 and counseling.

16 Plaintiff has not identified any evidence in the record to support his position
17 that his limitations would be present even without substance usage.⁷ Also, Plaintiff
18 has not shown that the residual functional capacity assessment, which incorporates
19 Dr. Klein's and Dr. Mabee's assessments, is not supported by substantial evidence.

20 **3. Resolution Conflicting Medical Opinions**

21 Plaintiff argues the ALJ improperly evaluated the medical opinions of his
22 providers. He states his mental conditions pose far greater limitations than what
23 was found by the ALJ.

24 Plaintiff was evaluated a number of times in connection with his application
25 for public assistance benefits provided by the State of Washington and in
26

27 ⁷Indeed, the only way to truly answer this hypothetical is for Plaintiff to abstain
28 from marijuana use.

1 connection with his application for social security benefits.

2 **a. May, 2008**

3 On May, 2008, Amy Robinson, M.S., completed a psychological/psychiatric
4 evaluation. She found that Plaintiff had the following *mild symptoms*: suicidal
5 trends, paranoid behavior, hallucinations; the following *moderate symptoms*:
6 depressed mood, verbal expression of anxiety or fear, expression of anger (verbal
7 and/or physical), social withdrawal, and physical complaints. (Tr. 283.) She
8 identified the following diagnoses: dysthymic disorder, cannabis dependence, and
9 borderline personality disorder with antisocial features. (Tr. 283.)

10 As for functional limitations, Ms. Robinson found the following *mild*
11 *limitations*: ability to understand, remember, and follow simple (one or two step)
12 instructions; the following *moderate limitations*: ability to understand, remember
13 and follow complex (more than two step) instructions, ability to learn new tasks,
14 ability to interact appropriately in public contacts, ability to care for self, including
15 personal hygiene and appearance; the following *marked limitations*: ability to
16 exercise judgment and make decisions, ability to perform routine tasks, ability to
17 relate appropriately with co-workers and supervisors, ability to respond
18 appropriately to and tolerate the pressures and expectations of a normal work
19 setting, ability to control physical or motor movements and maintain appropriate
20 behavior. (Tr. 284.) Ms. Robinson concluded Plaintiff would have significant
21 difficulties interacting appropriately in a typical work environment. (Tr. 293.) She
22 noted that he had difficulties with his teachers and peers. (Tr. 293.) Dr. Mabee
23 concurred. (Tr. 294.)

24 **b. April, 2009**

25 On April 3, 2009, Plaintiff was evaluated by Kayleen Islam-Zwart, Ph.D.
26 She concluded that Plaintiff's psychiatric symptoms are severe and he is clearly
27 unable to work. (Tr. 322.) It appears Dr. Islam-Zwart credited Plaintiff's
28 statements regarding his thoughts of suicide and fantasies of militating and killing

1 men, as well as his reports of sexual abuse.

2 She found Plaintiff had the following *mild symptoms*: motor agitation.
3 paranoid behavior, hallucinations; the following *moderate symptoms*: physical
4 complaints; and the following *marked symptoms*: depressed mood, suicidal trends,
5 verbal expression of anxiety or fear, and social withdrawal: the following *severe*
6 *symptoms*: expression of anger (verbal and/or physical). (Tr. 325.) She identified
7 the following diagnoses: posttraumatic stress disorder; intermittent explosive
8 disorder, depressive disorder NOS, somatoform disorder NOS, personality
9 disorder, NOS. (Tr. 325.)

10 As for functional limitations, Dr. Islam-Zwart found the following *moderate*
11 *limitations*: ability to care for self, including personal hygiene and appearance; the
12 limitations in restriction of activities of daily living, and moderate difficulties in
13 maintaining social functioning, and difficulties in maintaining concentration,
14 persistence, or pace; the following *marked limitations*: ability to exercise judgment
15 and make decisions, ability to interact in public contacts, ability to respond
16 appropriately to and tolerate the pressures and expectations of a normal work
17 setting, and ability to control physical or motor movements and maintain
18 appropriate behavior, and a *severe limitation* in ability to relate appropriately to
19 co-workers and supervisors. (Tr. 326.) Notably, Plaintiff told Dr. Islam-Zwart he
20 had not used marijuana for five weeks, but other records indicate that this was not
21 true.

22 **c. June, 2009**

23 On June 12, 2009, Dr. Bailey completed a Mental Residual Functional
24 Capacity Assessment and concluded that Plaintiff was *moderately limited* in the
25 ability to understand and remember detailed instructions, ability to carry out
26 detailed instructions, and ability to maintain attention and concentration for
27 extended periods. (Tr. 442-43.) No other significant limitations were identified.

28 **d. April, 2010**

1 As set forth above, Dr. Mabee conducted a psychological evaluation on
2 April 8, 2010. *See* Footnote 6. He concluded Plaintiff could function in a work
3 environment requiring limited social interaction, and has the cognitive capabilities
4 necessary to meet mild to moderate intellectual requirements. (Tr. 489.)

5 **e. June, 2010**

6 On June 25, 2010, Dr. Klein completed a Psychiatric Review Technique.
7 (Tr. 533.) Dr. Klein concluded that Plaintiff's marijuana usage affected his
8 limitations. He believed Plaintiff experienced mild restrictions of activities of
9 daily living, marked difficulties in maintaining social functioning, moderate
10 difficulties in maintaining concentration, persistence, or pace, and four or more
11 episodes of decompensation, but if marijuana usage was excluded, these
12 limitations would decrease to moderate difficulties in maintaining social
13 functioning. (Tr. 543.) He concluded Plaintiff had *moderate limitations* in his
14 ability to interact appropriately with the general public; ability to accept
15 instructions and respond appropriately to criticism from supervisors; and ability to
16 get along with co-workers or peers without distracting them or exhibiting
17 behavioral extremes (Tr. 548.)

18 The ALJ gave great weight to Dr. Klein's testimony at the hearing because
19 he had the opportunity to evaluate the entire file and his conclusion that Plaintiff
20 only has moderate limitations in social interaction in work like activities is
21 supported by the record. He gave little weight to Dr. Islam-Zwart's evaluation
22 because she relied quite heavily on the subjective reports of symptoms and
23 limitations provided by Plaintiff and seemed to uncritically accept as true most, if
24 not all, of what Plaintiff reported, even in light of the fact that Plaintiff's testing
25 scores suggested that he may exaggerate specific problems.

26 Dr. Mabee and Dr. Islam-Zwart are not treating physicians, but they
27 examined Plaintiff. A nonexamining expert is generally entitled to less weight than
28 the conclusion of an examining source. 20 C.F.R. §§ 404,1527(e), 416.927(e).

1 However, giving the examining physician's opinion more weight than the non-
2 examining expert's opinion does not mean that the opinions of non-examining
3 sources and medical advisors are entitled to no weight. *Andrews v. Shalala*, 53
4 F.3d 1035, 1041 (9th Cir. 1995). Rather, when an examining physician's opinion is
5 rejected by the ALJ in reliance on the testimony of a nonexamining advisor, the
6 reports of the non-examining advisor need not be discounted and may serve as
7 substantial evidence when they are supported by other evidence in the record and
8 are consistent with it. *Id.* Moreover, an ALJ may properly consider a claimant's
9 lack of credibility and the extent to which his physician's opinion is influenced by
10 the claimant's own information. *Id.* at 1040. Likewise, greater weight may be
11 given to the opinion of a non-examining expert who testifies at the hearing and is
12 subject to cross-examination. *Id.* at 1042.

13 Here, the ALJ gave specific, legitimate reasons for rejecting the examining
14 psychologist's opinions and for relying on the non-examining medical expert's
15 opinion instead. Dr. Klein questioned Plaintiff's credibility and provided specific
16 examples of why Plaintiff was not credible regarding his limitations and his
17 alleged abuse. Also, Dr. Klein was available for cross-examination. Because the
18 examining physicians relied on Plaintiff's own self-reporting, it was proper for the
19 ALJ to give these examining psychologist's opinions less weight.

20 **VIII. Conclusion**

21 Plaintiff has not met his burden of showing that if Plaintiff stopped using
22 marijuana he would still be disabled. Moreover, he has not met his burden of
23 showing that the ALJ committed legal error, or that its conclusion that Plaintiff
24 was not disabled from August 12, 2007 to July 15, 2010 was not supported by
25 substantial evidence.

26 Accordingly, **IT IS HEREBY ORDERED:**

27 1. Plaintiff's Motion for Summary Judgment, ECF No. 12, is **DENIED**.

28 ///

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1 2. Defendant's Motion for Summary Judgment, ECF No. 19, is
2 **GRANTED.**

3 3. The decision of the Commissioner denying benefits is affirmed.

4 4. The District Court Executive is directed to enter judgment in favor of
5 Defendant and against Plaintiff.

6 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
7 file this Order, provide copies to counsel, and **close the file.**

8 **DATED** this 14th day of August, 2013.

9
10 *s/Robert H. Whaley*
11 **ROBERT H. WHALEY**
 United States District Judge

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